83-5940

ORIGINAL

NO. A-348

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

RICHARD KING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted for the purpose of reweighing the evidence adduced at trial.

2. Whether certiorari should be granted to review "federal questions" which were not raised during trial.

3. Whether certiorari should be granted to review state court rulings grounded upon adequate foundations of state law.

4. Whether certiorari should be granted to revisit Petitioner's federal claims absent any deviation from established guidelines or any "special and important" reasons therefor.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, State of Florida, respectfully suggests that the Petition for Writ of Certiorari should be denied.

OPINION BELOW

The Petitioner's statement is accepted.

JURISDICTION

The petition at bar is presented pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted.

STATEMENT OF THE CASE

Richard King was convicted of first degree murder and sentenced to death, as noted in his petition. Peggy Burnside, the victim, was the second girlfriend of Mr. King to be killed by him.

The Petitioner appealed his conviction and sentence to the Supreme Court of Florida, without success. This petition for certiorari is a simple renewal of the grounds argued in the Supreme Court of Florida.

The facts relevant to each claim shall be set forth in order.

FACTS: ARGUMENT I

At no time did Mr. King plead insanity or allege incompetence to stand trial. No claim of any deprivation of any sixth or fourteenth amendment right was argued to the trial court.

Mr. King attempted to wrest control of his defense from his lawyer, Mr. Tabscott. King demanded all depositions be given to him for review and argued over witnesses. Ultimately, King tried to "fire" Tabscott, asking the court to relegate counsel to the role of "advisor." (R 3-19) This proposal was rejected.

Although King himself admitted full awareness of the charges and seriousness of the case, and was actively involved in his defense, his hostile conduct prompted the trial court to order a psychiatric evaluation.

Three psychiatrists examined King, finding him to be "sane," "alert," "coherent," "informed" and <u>able</u> (if not willing) to assist counsel (R 2535-39). At no time did any expert change or withdraw his opinion.

King asked the Supreme Court of Florida to re-weigh the expert testimony, reject the expert's own conclusions, and, essentially, form its own opinion. This request was denied, and King now seeks re-evaluation by this Honorable Court.

FACTS: ARGUMENT II

Counsel for the State and the defense stipulated to the exclusion of jurors biased for or against capital punishment (R 23). Four veniremen biased against capital punishment were excused without any Witherspoon objection. Three jurors biased in favor of capital punishment were excused, even though one of them insisted he would vote for a life sentence if the facts warranted one.

FACTS: ARGUMENT III

Mr. King was never a suspect in the Burnside murder. He was not being sought by the police. Mr. King fled from Orlando to the City of Daytona Beach where, after a change of heart, he surrendered himself to that city's police, freely confessing.

The officers to whom he surrendered were summoned on another call and thus were not present when the officers arrived from Orlando.

King at first wanted a lawyer, but when the Orlando deputies said they only wanted to know what King had already told the Daytona police, King agreed to speak (R 763,764).

King gave a third, exculpatory, statement later; (R 1006-1019) also, he testified at trial.

King's motion to suppress was denied, as was his appeal.

FACTS: ARGUMENT IV

King appealed the introduction of one of the photographs of the victim, but not all of the photographs. No federal claim was ever argued to the trial court.

King also appealed the admission of testimony relative to the issue of premeditation and the relationship between Burnside and himself. No federal claim was raised at trial.

FACTS: ARGUMENT V

Despite confessing to the crime, King sought to set up the victim's husband as an "alternative suspect." To accomplish this end, King wanted to ask Mr. Burnside if (and why) he ever invoked the fifth amendment.

This knowing presentation of false evidence was disallowed by the trial court and summarily rejected on appeal.

FACTS: ARGUMENT VI

Mr. King would like this court to review the sufficiency of the evidence in general and decide whether his motion for judgment of acquittal should have been granted.

FACTS: ARGUMENT VII, VIII

(No factual issues).

FACTS: ARGUMENT IX

Mr. King would like this court to simply reweigh the evidence supporting the sentence imposed.

SUMMARY OF ARGUMENT

It is suggested that certiorari should be denied for several reasons, including Petitioner's improper request for de novo factual determinations; his failure to adequately raise federal questions in state court; his improper request for a second appeal on non-federal issues; and his failure to allege or show a proper or sufficient basis to prompt this Honorable Court's exercise of jurisdiction.

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED FOR THE PURPOSE OF REWEIGHING THE EVIDENCE ADDUCED AT TRIAL.

The Petitioner asks this Honorable Court to substitute its own findings of fact for those of the trial judge and jury. It is respectfully submitted that certiorari review does not exist to allow continuous reargument regarding the weight of the evidence or the credibility of the witnesses. Sumner v. Mata, ___U.S. ___, 102 S.Ct. 1303 (1982); Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 94 S.Ct. 2328 (1974); United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1925).

Mr. King takes certain observations by the three court appointed psychiatrists out of context and asks this Honorable Court to find that these doctors "did not mean it" when they said he was alert, lucid, coherent and capable of assisting counsel. Then, relying again on cold transcripts, he asks for the reweighing of the testimony of police officers (during suppression hearings) and veniremen (during voir dire). At no time does Mr. King address the recognized prohibitions against "reweighing evidence on appeal." See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), 454 U.S. 1122, 102 S.Ct. 2211 (1982).

Most untenable of all is his claim that the denial of his motion for judgment of acquittal should be reviewed. In ruling upon these motions, trial judges do not sit as neutral "triers of fact." Rather, they simply decide whether the case is sufficient to go to a jury if every fact and every inference is taken in the State's favor. See Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied 103 S.Ct. 1883 (1983).

ARGUMENT

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW "FEDERAL QUESTIONS" WHICH WERE NOT RAISED DURING TRIAL.

In Mr. King's appeal to the Supreme Court of Florida, passing reference was made to various sections of the Constitution. The trial court, however, was never presented with an opportunity to consider federal claims regarding any of the following:

1. The issue of King's competence. (In fact, King never alleged or argued incompetence prior to his appeal).

2. The issue of the admission of photographs or the issue of King's right to present "false" evidence incriminating an innocent man.

3. The issue of the admission of evidence of "prior acts or misconduct."

4. The merits of King's motion for judgment of acquittal.

5. The weight to be afforded the evidence adduced during the sentencing phase.

It is submitted that mere passing references to the Constitution of the United States in an appellate brief does not overcome the Petitioner's failure to afford the trial court an opportunity to rule on the proposed "federal questions." The Respondent is unaware of any jurisdiction which permits waiver of argument at trial and de novo argument on appeal, absent fundamental error (which was not alleged here).

Indeed, simply because certain state laws and state court opinions duplicate or even follow federal standards, reference to these state authorities will not suffice to preserve the federal questions (perceived later) for appellate review. Anderson v. Harless, ___U.S. ___, 103 S.Ct. 276 (1982); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962); See Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558 (1982).

Also, where adequate, independent, state and federal grounds exist for a state court ruling, it is not presumed that the federal question provided the basis for the decision. Grayson v. Harris, 267 U.S. 352, 45 S.Ct. 317 (1925).

The decisions of the trial court were based upon the weight of the evidence and upon the laws of Florida, including Florida's evidence code. The Supreme Court of Florida summarily disposed of most of the claims raised without reference to any federal ground. That would be in keeping with Florida's appellate prohibition against de novo claims on appeal. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Inasmuch as Mr. King did not present federal questions to the trial court on any issues other than those discussed below; and absent any ruling on any alleged federal question by the Florida Supreme Court, it is respectfully suggested that certiorari not be granted.

ARGUMENT

III

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW STATE COURT RULINGS GROUNDED UPON ADEQUATE FOUNDATIONS OF STATE LAW.

Mr. King seeks review of certain issues of state law, including the admission of photographs and so-called "character" evidence at his trial; a perceived "limitation" of cross examination, denial of his motion for judgment of acquittal and the "failure" of the trial court to order a presentence investigation.

The issues surrounding the admission of photographs and evidence of prior misconduct[1] were summarily rejected. A substantial body of law supported admission of photographs of Mr. King's handiwork. See Swann v. State, 322 So.2d 485 (Fla. 1975); State v. Wright, 265 So.2d 361 (Fla. 1972). The record showed that the trial court rejected many, if not most, of the proffered photographs - thus negating any claim of bias on the court's part. Likewise, Florida law permits the admission of evidence tending to prove modus operandi, bias, motive, lack of mistake and the relationship between the defendant and the victim. See Williams v. State, 110 So.2d 654 (Fla. 1959), 361 U.S. 847 (1959). Where "intent" is an issue, this evidence is admissible.

The Petitioner attempts to argue the impact of Barwicks v. State,[2] 82 So.2d 356 (Fla. 1955). Again, any conflict between Williams and Barwicks represents an issue of state, not federal law.

In a similar vein, no "federal question" rested at the heart of Mr. King's claim that he was not allowed to develop

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1. King beat up the victim twenty-three days before killing her. He killed his first "common law" wife with an ax.

2. Barwicks was argued to Florida's Supreme Court and rejected. That case does not stand for the proposition set forth by King. Rather, it deals with the relevance of an old altercation to claim of self-defense.

a "highly likely alternative suspect," Mr. Burnside.

When someone exercises his fifth amendment privilege, neither Florida nor Federal law allows cross examination or impeachment on that point. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257 (1982). Florida, in addition, does not allow counsel to knowingly develop "false" evidence for the purpose of deceiving the jury. Coco v. State, 62 So.2d 892 (Fla. 1953); Fulton v. State, 335 So.2d 280 (Fla. 1976); Rolle v. State, 386 So.2d 3 (Fla. 3d DCA 1980); Fla. Bar Code Prof. Resp. EC 7-26 and DR 7-102(A)(1)(4).

Again, certiorari review would not be proper.

Mr. King challenges the denial of his motion for judgment of acquittal without addressing any relevant Florida law on that point. Motions for judgment of acquittal are creatures of Florida procedural law, not federal law. (These motions are discussed in detail in the preceding section). No federal question exists, and no certiorari review should be granted.

Similarly, the fact that a pre-sentence investigation was not ordered presents an issue of state, not federal, law. In death cases, where the sentencing alternatives are between essentially mandatory sentences (twenty-five year mandatory minimum and/or death), and where a separate evidentiary hearing is held on the sentencing issue, redundant pre-sentence investigations are not required. See Thompson v. State, 389 So.2d 197 (Fla. 1980). This argument was properly rejected without comment by the Supreme Court of Florida, and is not subject to review. Gryger v. Burke, 334 U.S. 728 (1948).

In each of the above referenced instances, claims of error were rejected on the basis of state law, some of which has its origins in federal law. Nevertheless, it is again suggested that state decisions resting upon adequate foundations of state law are not subject to federal review.

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

Certiorari should not be granted.

ARGUMENT

IV

CERTIORARI SHOULD NOT BE GRANTED TO REVISIT PETITIONER'S FEDERAL CLAIMS ABSENT ANY DEVIATION FROM ESTABLISHED GUIDELINES OR ANY "SPECIAL AND IMPORTANT" REASONS THEREFOR.

The "federal questions" that were raised and ruled upon were not disposed of in a manner that conflicts with the decisions of this court or presents a novel issue worthy of certiorari review. See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963); Rice v. Sioux City Memorial Park, 349 U.S. 70, 75 S.Ct. 614 (1955).

For example, King challenges a finding by the trial court, upheld on appeal, that he voluntarily spoke to the police. (It must be noted that King would not have been arrested or questioned had he not called the police and turned himself in). King received a full hearing on his fourth, fifth, sixth and fourteenth amendment claims. The Supreme Court of Florida ruled on the basis of Edwards v. Arizona, 451 U.S. 477 (1981), and Michigan v. Mosely, 423 U.S. 96, (1975) that, based upon the facts and circumstances of the case, no violation of federal rights took place. See also Michigan v. Tucker, 417 U.S. 433 (1974).

Mr. King's talkative nature, from his decision to call the police to his fights with defense counsel, to his decision to testify at trial, clearly supports the court's determination.

Mr. King has also raised a Witherspoon claim.[3]

The ability of venireman Kimble to follow the law was analyzed during voir dire. No Witherspoon objection accompanied his discharge. Looking only at cold transcripts, we are not in a position to evaluate his demeanor or credibility.

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3. Again, this claim was not raised at trial (and was not preserved for review) as to any challenged juror.

We do know, however, that pro-death jurors were rejected including Mr. Chapham, who said he might extend mercy despite his pro-death philosophy. Thus, we do not have a record of a court sitting a "hanging jury" or a "death biased" jury. Witherspoon v. Illinois, 391 U.S. 510 (1968); Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968).[4]

To the court which saw and heard the veniremen, the bias of both Kimble (anti-death) and Chapham (pro death) was obvious and unmistakably clear. They could not be trusted to abide by the law or follow the instructions of the court. Exclusion of these jurors was proper, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138 (1969), and did violate the dictates of Taylor v. Louisiana, 419 U.S. 522 (1975).

Finally, the constitutionality of Florida's death penalty statute has been recognized in every case before this court since Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2965 (1976). No new or compelling arguments against that statute have been presented to prompt certiorari review.

CONCLUSION

In a lengthy petition, Mr. King has collected a menagerie of arguments relating to the weight of the evidence at trial, state court interpretations of state law, federal claims that were waived at the trial court level, and federal claims that were resolved in a manner consistent with the requirements of this Honorable Court. Mr. King has failed to allege or argue any reason for this Court to amend its

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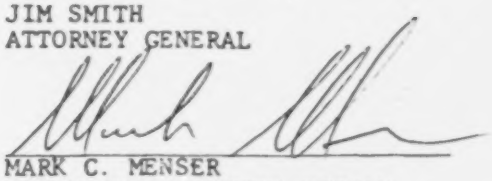
4. This Honorable Court found that the jury in Bumper, which should have been prejudiced in favor of death under the Witherspoon theory, recommended life. This dilemma was overcome by ruling that Witherspoon would not be applied unless the petitioner demonstrated bias. While the jury sub judice suggested death, the record of the voir dire shows balance in the rejection of pro and anti death biased jurors. Absent record prejudice, Bumper should control, prohibiting consideration of any alleged error.

standards for certiorari review and accept his case.

Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ Of Certiorari To the Supreme Court Of Florida, Brief For Respondent In Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

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All parties required to be served have been served on this 28th day of February, 1984.

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